IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1525

ROBERT R. KAUFMAN,

Petitioner,

-against-

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978

ROBERT R. KAUFMAN,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, filed January 27, 1978, which affirmed two orders of the United States District Court for the Southern District of New York, both dated October 19, 1977 and entered October 21, 1977, which dismissed the complaint of the petitioner.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit was filed in that Court on January 27, 1978, and it has not yet been officially reported. A copy of such opinion is printed beginning at page 4a of the Appendix herein.

The opinion of the District Court of the United States for the Southern District of New York, (Charles M. Metzner, J.) is dated October 19, 1977, and is printed in the Joint Appendix at page 115A. (9 copies submitted herewith).

JURISDICTION

This petition for certiorari to review the judgment of the United States Court of Appeals for the Second Circuit filed January 27, 1978, is being timely made within 90 days of the filing of such judgment.

The jurisdiction of this Court to review such judgment is invoked pursuant to 28 U.S.C. section 1254.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

No person *** shall be compelled in any criminal case to be witness against himself ***.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1 *** nor shall any State deprive any person of life, liberty, or property, without due process of law; ***

QUESTIONS PRESENTED

1. Will our Supreme Court lend judicial assistance to avoid injustice in this case where it is documented by direct evidence?

2. Will this court decide the constitutional issues on the merits where the State Courts by order have stated they did not decide the same and where in effect they have refused to do so?

3. Will this court reaffirm its holding in the *Mooney v. Holohan* case 294 U.S. 103 and directly afford this petitioner review where the state court has without cause, refused to do so.

4. Has procedural due process been denied to petitioner?

5. Can coercion, letter documented, be allowed to stand uncorrected?

STATEMENT OF CASE

THE FACTS

Plaintiff was admitted to practice as an attorney and counsellor at law in the State of New York, on February 2, 1938. Disciplinary proceedings were instituted on June 12, 1962 by the filing of a petition containing charges of professional misconduct. A supplemental petition containing additional charges was filed, after Mr. Frank, then counsel to respondent, obtained plaintiff's papers and files pursuant to threats and his coercive letter of August 14, 1964, printed in the Joint Appendix (2nd Cir.) at page 10A, on November 17, 1964.

A hearing was held on the charges before a referee who was designated by specific order and who was empowered to hear only the specific charges, as referred to him. The referee's report was dated September 24, 1965 sustaining six of the nine charges filed against this petitioner. On February 3, 1966 the Appellate Division First Department confirmed the report of the referee (on motion) and ordered the petitioner disbarred from practice as an attorney and counsellor at law in the State of New York, effective March 3, 1966. After subsequent proceedings in the Appellate Division and court of appeals in which petitioner sought unsuccessfully to have reconsideration of the disbarment order, petitioner moved on March 10, 1967 for reopening of the disciplinary proceedings and suppression of certain evidence on the ground that he had been coerced into providing the committee on grievances of respondent with incriminating evidence in violation of the Fifth Amendment privilege against self incrimination.

On May 4, 1967, the appellate division denied petitioner's motion, and on July 7, 1967, the Court of Appeals, denied petitioner's motion for leave to appeal and

dismissed the appeal taken as of right.

NO HEARING WAS HAD IN ANY COURT other than the hearings before the referee recited supra.

NO APPEAL WAS HAD IN ANY COURT before this appeal to the Circuit Court of Appeals, Second Circuit.

On November 6, 1967 petitioner filed a petition for a writ of certiorari in the Supreme Court of the United States claiming that the use of incriminating evidence and testimony obtained by respondent by coercion in the disciplinary proceedings violated petitioner's rights under the Fifth Amendment, as incorporated in the Fourteenth Amendment with respect to State action.

This petition was denied on January 15, 1968, but the Court advised:

> "The Court today entered the following order in the above entitled case (Robert R. Kaufman): No. 795 Oct. Term 1967. The petition for a writ of certiorari is denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion that Certiorari should be granted.
>
> John F. Davis, Clerk
> by C.T. Lydano"

On February 3, 1969 petitioner filed a petition in the appellate division for recall and reconsideration of the disbarment order of February 3, 1966 on the ground that his constitutional right to due process of law guaranteed by the Fourteenth Amendment was violated by the finding of the referee that he had made certain fraudulent assignments, although the charges in the disciplinary proceedings included no such specification. The finding with respect to fraudulent assignments occurred in connection with Charge No. 8 in the supplemental petition filed by the respondent herein. The order of reference to the referee did not submit or refer to him any such charge or specification. This charge contained allegations that petitioner converted to his own use his client's share of the

proceeds of the settlement of a claim for personal injuries, subsequently issued a check for his client's share of the settlement which was returned because of insufficient funds, and falsely represented to the counsel for the committee on grievances that the clients had agreed to lend petitioner their share of the settlement proceeds.

In connection with his finding with respect to this charge that petitioner had converted to his own use a share of the settlement proceeds due his clients, the referee made the further finding that, in an effort to hold off his clients, petitioner made assignments to them of obligations owing to him. The referee devoted several pages of his report to a discussion of these assignments (Referee's report, Joint Appendix submitted herewith, printed at page 102A) characterized these assignments as worthless (p. 102A Joint App.) and "fraudulent" (Id. at 105A, and found, as a result of the assignment that the petitioner engaged in a course of misconduct and acted in a fraudulent manner (*id* at 105A.)

Charge No. 8 in connection with which the referee made these findings and conclusions contained no allegations with respect to assignments or improper conduct in relation thereto, and no such charge was ever referred to him for determination.

The said assignment, which the referee found worthless, and fraudulent, though no charge or specification existed for the same, was upheld by the Supreme Court New York County, Frederick Backer, J., in May 1969, to the extent of $4969.24, (Joint App. pps. 12A, 13A, 14A.) submnitted herewith.

The opinion of the appellate division on the motion to confirm the referee's report upheld his finding with respect to charge No. 8 without comment on the finding with respect to fraudulent assignments.

Petitioner's motion to recall and reconsideration on the ground that his constitutional rights were violated

when he was found guilty of having made fraudulent assignments without any notice of such charge and without such charge having been made or existing was denied by the appellate division on March 25, 1969. On May 15, 1969, the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal and dismissed his appeal taken as of right.

Petitioner was interrogated at Respondent's office by Mr. Frank, their attorney in 1961 and 1962, where he appeared at their direction.

At no time during Mr. Frank's interrogation was petitioner represented by counsel nor was petitioner advised of his rights.

Petitioner applied to the Appellate Division First Department on June 21, 1966 to amend the order of February 3, 1966, heretofore made, to recite that upon the matter there were presented and necessarily passed upon questions under the Constitution of the United States. This motion was denied by order dated and entered July 7, 1966. (Appendix A, printed at p. 1a Petitioner applied to the Appellate Division for reconsideration of the February 2, 1966 order on October 8, 1975. This application for a new trial was based upon *newly discovered evidence*, namely Judge Backer's order, *supra*, sustaining the very assignment the Referee found fraudulent.

This application was denied by order dated *February 19, 1976*. Petitioner herein then applied for reconsideration and reargument of the motion for a new trial, on March 16, 1977 and for a new trial. This application was denied. Petitioner then moved in the Court of Appeals on May 16, 1977 for an order granting leave to appeal from the order of the Appellate Division dated March 28, 1977. On July 13, 1977 this application was denied.

Petitioner at all times before the State Courts raised the Federal Constitutional questions. Petitioner on the motion in the Appellate Division for a new trial returnable

October 8, 1975 raised the federal constitutional question, and he did so on the motion for a new trial returnable March 16, 1977. Both these motions were denied, supra. Petitioner duly raised the Federal constitutional question on the motion in the Appellate Division to amend the order of February 2, 1966, to recite that upon the matter there were presented and necessarily passed upon questions under the Constitution of the United States. This motion was denied by order dated July 7, 1966. The petitioner recited his federal constitutional deprivations in his complaint before the United States District Court (Complaint annexed to Joint Appendix submitted P2A par. 2, P3A par. 3, P4A par. 3, P5A par. 3, P6A par. 4, par. 5, par. 6, P7A par. 7, par. 9, P9A, par.(3)(a).

REASONS FOR GRANTING THE WRIT

1. The United States District Court Charles M. Metzner J., found that plaintiff there, Petitioner here, raised the Federal Constitutional questions, in all the State Court proceedings. (Pg. 115A Joint Appendix Par. 2). The State Courts refused to pass on the constitutional (Federal) questions. (Order of App. Div. July 7, 1966, supra.)

Our courts have held, that the refusal to pass upon the federal question is just as reviewable as an express decision on the point. (Stern & Grossman-Supreme Court Practice, Third Edition P95 lines 10 & 11.)

Since the federal constitutional questions were raised in the motions for a new trial as well (supra) review should be granted. Chicago B & Q R. Co. v. Chicago, 166 U.S. 226, 23; -2/

2. Respondent's coercive demands, in the course of its investigation of petitioner's fitness to continue as a member of the bar, that petitioner furnish documents and information pertinent to possible disciplinary charges confronted petitioner with the alternative of providing his

accuser with inculpatory evidence with respect to possible disbarment or being disbarred for his refusal to do so. Our adversary system of justice safeguarded by the constitution prohibits placing a person in such a dilemma. (Resp. letter of August 14, 1964 (Jt. App. p. 10A)).

Punishment cannot be imposed for refusal to furnish incriminating information in reliance upon the privilege. *Spevack v. Klein* 385 U.S. 511; *Griffin v. California*, 380 U.S. 609. And, if incriminating information is furnished under threat of punishment for refusal to supply it, the information so coerced is not available for use as evidence in a criminal case. *Garrity v. New Jersey*, 385 U.S. 493.

In *Garrity v. New Jersey*, 385 U.S. 493 several officers were questioned in connection with an investigation by the Attorney General of New Jersey into alleged ticket fixing. Each officer was warned that anything he said could be used against him in any criminal proceeding and that his Fifth Amendment privilege applied but that his refusal to answer any questions would subject him to removal from office under New Jersey Rev. Stat. Sections 2A; -17. (Supp. 1965).

Under the circumstances the officers answered the questions and some of their answers were then used in criminal prosecutions of them. The officers were convicted in the state courts despite the officers objections that the convictions in large part were based on statements which had been coerced. In reversing the convictions the Supreme Court noted:

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their jobs or means of a livelihood or pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent." Id. at 497.

The court further noted that "where the choice is

between the rock and the whirlpool; duress is inherent in deciding to waive one or the other. "Id. at 498, and the court concluded, there was no voluntary waiver of the privilege.

In *Spevack v. Klein* 385 U.S. 511, appellant a lawyer, was called upon to produce records and to testify in a disciplinary proceeding then pending against him but refused to do so on the basis that the production of the records and his testimony might tend to incriminate him. He was subsequently disbarred.

The Court found that the threat of disbarment with the concommitant loss of professional standing and livelihood was coercive and held that the lawyer, like the policeman in *Garrity*, could not be forced to choose between self incrimination and loss of employment or professional standing. Id. at 516.

In a concurring opinion Justice Fortas distinguished between the lawyer and a public employee but held that the lawyer's rights were to be sustained.

In accord with the above holdings by the Supreme Court are *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation men v. Sanitation Commissioner*, 392 U.S. 280 (1969) and *Lefkowitz v. Turley*, 414 U.S.70 (1973).

The pronouncement in the *Garrity*, *Gardner* and *Spevack* cases was reaffirmed in the *Lefkowitz v. Cunningham* case decided by this court on June 13, 1977, No. 76-260.

3. Petitioner was denied procedural due process in violation of the Fourteenth Amendment because the disbarment order of February 3, 1966, was predicated, in parts on a finding of misconduct of which petitioner had no notice. The applicability to disciplinary proceedings of the due process notice requirement was established by this Court's decision in *In Re Ruffalo*, 390 U.S. 544.

In the Ruffalo case the court noted "the charge (No. 13) for which petitioner stands disbarred was not in the original charges made against him" 390 U.S. at 549. "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer, * * * He is accordingly entitled to procedural due process which includes fair notice of the charge." 390 U.S. 550. The court observed further that "These are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence." 390 U.S. at 551. The opinion concluded that "This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." 390 U.S. at 552.

The referee's finding that petitioner made fraudulent assignments to deceive a client is obviously relevant to his suitability to continue as a member of the bar. It must be assumed therefore, that the finding had a bearing on the determination that disbarment was an appropriate disciplinary measure. The fact that the finding was not identified as a separate charge does not weaken its effect. Nor does the fact that it was considered in connection with another charge render notice of that charge fair notice with respect to the fraudulent assignments finding. The charge that petitioner had appropriated his client's share of settlement proceeds, which petitioner claimed had been loaned to him, was wholly independent of petitioner's subsequent assignment to the clients of obligations due him by third parties. The referee's findings with respect to the former were made independently of his findings with respect to the assignments. Similarly, the Appellate Division in confirming the referee's report made a finding with respect to the charge involved independently of any

reference to the subsequent assignments. The finding with respect to the subsequent assignments, therefore, can only be regarded as a prejudicial finding concerning a separate matter with respect to which petitioner had no notice. As the Court noted In Re Gault, 387 U.S. 133,

> "Notice to comply with due process requirements, must be given sufficiently in advance of court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity."

The Court's decision in Ruffalo establishes that this notice requirement is applicable to disciplinary proceedings. Since the Referee found that petitioner had made fraudulent assignments, although he had been given no notice of any such charge, the court below should have granted petitioner's motion for reconsideration and a new trial. Its failure to apply the decision of this court in Ruffalo warrants review by this Court.

4. The Constitutional Issues have not been decided by any Court. There is no res judicata. There has been no Appellate Review of the determination of the Appellate Division. The Appellate Division has denied leave to appeal and so has the Court of Appeals of the State of New York. No opinions for such denial have been handed down.

This court has repeatedly stated that a denial of certiorari is not an adjudication on the merits and has no res judicata effect. *Brown v. Allen*, 344 U.S. 433, 457-458, 73 S. Ct. 397, (1953); Id. 344 U.S. at 491-492. 73 Sup. Ct. 397 (opinion of Frankfurter, J. concurring) *United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181.

> Similarly, the New York Court of Appeals has held that denial of leave to appeal is discretionary and is not equivalent to a decision on the merits. Matter of Marchant v. Meade-Morrison Mfg. Co. 252 N.Y. 284, reargument denied 253 N.Y. 534 appeal dismissed, 282 U.S. 808.

Thus neither the state courts nor the Supreme Court have decided the constitutional issues.

In *Lombard v. Board of Education of the City of New York*, 502 F. 2d at 635-636, the Court thus held that neither the Rooker case nor the doctrine of res judicata would bar this action.

Where a party has been denied a hearing, as in the case at bar, the court will not invoke res judicata. (Lombard v. Board of Education, supra).

The issues in this action as raised by the complaint (Jt. App. P2A-9A) are not the same as the issues that were decided in the State Court, the parties are not the same. The Circuit Court erroneously assumed that the issues were all passed upon. Since the order of the Appellate Division of July 7th, 1966 establishes that the constitutional issues were not passed upon and hence not determined, res judicata does not apply.

5. In paragraph 5 of the complaint (Jt. App. Pg 6A) plaintiff there and petitioner here alleges that Counsel to the Respondent withheld vital information from the referee and failed to disclose the same to the Appellate Division. Petitioner claims that such withholding of material evidence constitutes a denial of due process. This issue was never determined by any tribunal. The facts are that Mr. Frank had information long before the disciplinary hearings that petitioner claimed his client loaned him the funds in question. Mr. Frank failed to disclose this to the Referee and allowed him to find in his report that Kaufman blurted interest out at the hearing for the first time, in effect to cover himself.

Instead of informing the Appellate Division that he had this information, Mr. Frank allowed this grievous error

on the part of the referee to continue and he moved to confirm the referee's report before the Appellate Division.

In *People v. Riley*, 83 N.Y.S. 2d 281, brought 12 years after a defendant was disbarred on a conviction arising out of the said case the court granted an application of defendant and vacated the judgment of conviction on the finding that he was deprived of a fair trial by the District Attorney withholding evidence.

In *People v. Steele*, 65 N.Y.S. 2d 214, 222 a judgment of conviction was reversed where there was a withholding of material testimony or evidence by the prosecution which would or might have caused a different result, as in the case at bar.

In the case of *Lyons v. Goldstein*, 290 N.Y. 19 the Court of Appeals held it was within the inherent power of the court to set aside the conviction where the judgment was based upon fraud, trickery, deceit, coercion or misrepresentation.

In *Mooney v. Holohan*, 294 U.S. 103 this court held:

> the safeguards of due process should be present not only at the inception of a trial and maintained throughout the proceedings, but should be carried along into post trial practice.

This Court has insisted that each state provide some adequate remedy whereby a post trial procedure is available to test the legality of a conviction even though it appears proper on the surface, so that:

> "questions of fundamental justice protected by the due process clause may be used, to use the lawyer's language, dehors the record."

The examination of the case cited in the light of the due process clause points to the necessity of a remedy in the state courts whereby errors in fact which do not appear on the record and hence not subject to review on appeal can be reviewed without having to invoke a federal jurisdiction.

This the state courts did not afford and hence this Federal action (*supra*) was commenced. This was never determined, and hence there is no res judicata.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD J. McLAUGHLIN
Attorney for Petitioner

Robert R. Kaufman
Co-Counsel

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

In the Matter
of
ROBERT R. KAUFMAN,
An Attorney.

S I R :

PLEASE TAKE NOTICE that the within is a copy of an order duly made in this proceeding and duly entered and filed in the office of the Clerk of the Supreme Court of the State of New York, Appellate Division, First Department, on the 7th day of July, 1966.

Dated: New York, July 11, 1966.

Yours, etc.,

JOHN G. BONOMI
Attorney for The Association
of the Bar of the City
of New York
36 West 44th Street
New York, N.Y. 10036

TO:
Robert R. Kaufman, Petitioner
Appearing Pro Se
51 Chambers Street
New York, N.Y.

APPENDIX B

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 7th day of July, 1966.

Present—
Hon. BERNARD BOTEIN,
CHARLES D. BREITEL,
HAROLD L. STEVENS,
SAMUEL W. EAGER,
ARON STEUER,

Justices

In the Matter
of
Robert R. Kaufman,

An Attorney.

The above-named petitioner, Robert R. Kaufman, having moved this Court for an order staying the operation and effect of the order of disbarment of this Court, entered on February 3, 1966, effective March 3, 1966, and for a further order amending the order heretofore made to recite that upon the matter there were presented and necessarily passed upon questions under the Constitution of the United States; and for other relief,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavits of Robert R. Kaufman, duly sworn to the 17th day of June, 1966 and the 21st day of June, 1966, in support of said motion, and the affidavit of Michael Franck, duly sworn to the 20th day of June, 1966, in opposition thereto, and after

hearing Mr. Robert R. Kaufman, appearing pro se, for the action, and Mr. John G. Bonomi, attorney for The Association of the Bar of the City of New York, opposed,

It is ordered that the said motion be and the same hereby is denied.

ENTER:

FRANK H. CRABTREE
DEPUTY CLERK.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of January, one thousand nine hundred and seventy-eight.

Present:
HONORABLE IRVING R. KAUFMAN,
Chief Judge.
HONORABLE J. EDWARD LUMBARD
HONORABLE WILLIAM H. MULLIGAN,
Circuit Judges.

ROBERT R. KAUFMAN,
Plaintiff-Appellant,

-v.

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by appellant *pro se* and by counsel for appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said

District Court dismissing appellant's complaint be and it hereby is affirmed. In this action brought under 42 U.S.C. §1983, appellant seeks to overturn the order of disbarment issued against him by the Appellate Division, First Department, on February 3, 1966. During the nearly twelve years that have since passed, he pursued numerous appeals within the New York State courts. The due process and Fifth Amendment claims now before us were raised during these appeals, and the United States Supreme Court denied certiorari on these claims. Under these circumstances, we follow this Court's previous decision in *Turco v. Monroe County Bar Ass'n.*, 554 F 2d 515 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3216 (Oct. 3, 1977), and find that appellant's action is barred by the doctrines of res judicata and collateral estoppel.

s/ Irving R. Kaufman
IRVING R. KAUFMAN, Chief Judge.

s/ J. Edward Lumbard
J. EDWARD LUMBARD

s/ William H. Mulligan
WILLIAM H. MULLIGAN,
Circuit Judges.

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-against-

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Respondent.

SUPPLEMENTAL APPENDIX

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ORDER OF THE APPELLATE DIVISION FIRST DEPARTMENT MADE FEBRUARY 3, 1966

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 3rd day of February, 1966.

Present—Hon. Bernard Botein, Presiding Justice,
Charles D. Breitel,
Harold A. Stevens,
Samuel W. Eager,
Aron Steuer, Justices.

In the Matter
of
Robert R. Kaufman,
An Attorney.

The Association of the Bar of the City of New York, by Eric Nightingale, Esq., its attorney, having presented to this Court on the 12th day of June, 1962, a petition containing charges of professional misconduct against the above-named respondent, Robert R. Kaufman, who was admitted to practice as an attorney and counselor-at-law in the State of New York, on the 2nd day of February, 1938, at a term of the Appellate Division of the Supreme Court, Second Judicial Department, and having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the respondent having appeared herein by his attorney, Rudolph Stand, Esq., and having interposed an answer to said petition, duly verified the 25th day of June, 1962, and the Court having duly made and entered an order on the 12th day of July, 1962, appointing Theodore R. Kup-

ferman, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and thereafter and on the 17th day of November, 1964, The Association of the Bar of the City of New York, having presented to this Court a supplemental petition containing additional charges of professional misconduct against the above-named respondent and having petitioned the Court to take such action upon such additional charges as in the judgment of said Court justice may require, and the respondent having appeared herein by his attorney, H. Elliot Wales, Esq., and having interposed an answer to said supplemental petition, duly verified the 18th day of November, 1964, and the Court having duly made and entered an order on the 1st day of December, 1964, appointing Theodore R. Kupferman, Esq., as Referee herein to take testimony in regard to said additional charges and to report to this Court his opinion thereon; and thereafter and on the 18th day of February, 1965, an order of this Court having been made and entered relieving Theodore R. Kupferman, Esq., as Referee herein, which appointment was contained in the orders of this Court entered on July 12, 1962 and December 1, 1964, and appointing Samuel C. Coleman, Esq., as Referee in the place and stead of Theodore R. Kupferman, Esq., and a stipulation having been entered into between the attorneys for the respective parties, dated January 25, 1965, that the record of the proceedings held to date before Theodore R. Kupferman, Esq., Referee, including the testimony of all witnesses, shall be binding in the same manner as if same had taken place before the new Referee; and the hearing, pursuant to said order of reference having been duly continued before Referee Samuel C. Coleman and the said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was dated the 24th day of September, 1965, and was filed in the office of the Clerk of this Court on the 1st day of October, 1965;

And the petitioner thereafter and on the 7th day of December, 1965, having moved for an order confirming the Referee's report and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper.

Now, upon reading the petition of The Association of the Bar of the City of New York, verified the 31st day of May, 1962, the affidavit of Eric Nightingale, Esq., annexed thereto, sworn to the 29th day of May, 1962, the notice of presentation of said petition, dated the 31st day of May, 1962, with proof of due service thereof upon the respondent, the answer of the respondent to said petition, verified the 25th day of June, 1962, the order of this Court, dated the 12th day of July, 1962, appointing Theodore R. Kupferman, Esq., as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on the 12th day of July, 1962, the supplemental petition of The Association of the Bar of the City of New York, verified the 4th day of September, 1964, the affidavit of John G. Bonomi, Esq., annexed thereto, sworn to the 3rd day of September, 1964, the notice of presentation of said supplemental petition, dated the 4th day of September, 1964, with proof of due service thereof upon the respondent, the answer of the respondent to said supplemental petition, verified the 16th day of November, 1964, the order of this Court, dated the 1st day of December, 1964, appointing Theodore R. Kupferman, Esq., as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on the 1st day of December, 1964, the order of this Court entered on February 18, 1965, relieving Theodore R. Kupferman, Esq., as Referee herein, and appointing Samuel C. Coleman, Esq., as Referee in the place and stead of Theodore R. Kupferman, Esq., the stipulation of the attorneys for the respective parties, dated January 25, 1965, the report of Samuel C. Coleman, Esq., the Referee herein, dated the 24th day of September, 1965, together with the testimony taken by him and the exhibits

offered in evidence, which were filed in the office of the Clerk of this Court on the 1st day of October, 1965: and upon reading and filing the notice of motion for an order confirming the report of the Referee and adjudging the respondent guilty of professional misconduct, dated the 26th day of October, 1965, with proof of due service thereof, and after hearing Mr. John G. Bonomi for the motion, and Mr. H. Elliot Wales opposed, and due deliberation having been had thereon; and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counselor-at-law, it is hereby unanimously

Ordered that the report of Samuel C. Coleman, Esq., the Referee herein, filed in the office of the Clerk of this Court on the 1st day of October, 1965, be, and the same hereby is, confirmed; and it is further unanimously

Ordered that the said Robert R. Kaufman be and he hereby is disbarred from practice as an attorney and counselor-at-law in the State of New York effective March 3, 1966, and it is further unanimously

Ordered that the name of said Robert R. Kaufman be struck from the roll of attorneys and counselors-at-law in the State of New York effective March 3, 1966; and it is further unanimously

Ordered that the said Robert R. Kaufman be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, effective March 3, 1966; and it is further unanimously

Ordered that the said Robert R. Kaufman be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, effective March 3, 1966; and is further unanimously

Ordered that the said Robert R. Kaufman be and he hereby is forbidden to give to another an opinion as to the

law or its application or any advice in relation thereto effective March 3, 1966.

ENTER:
HYMAN W. GAMSO
Clerk

APPELLATE DIVISION—SUPREME COURT—FIRST DEPARTMENT STATE OF NEW YORK

I, HYMAN W. GAMSO, Clerk of the Appellate Division of the Supreme Court, First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on FEB 3 1966 and that the same is a correct transcript thereof, and of the whole of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on FEB 3 1966
Hyman W. Gamso Clerk

ORDER DISMISSING COMPLAINT

Robert R. Kaufman v. Association of the Bar of the City of New York
77 Civ. 3731 (CMM)

Plaintiff has moved for a preliminary injunction. Defendant countermoves to dismiss the complaint on several grounds, including lack of subject matter jurisdiction.

Plaintiff predicates his action on 42 U.S.C. §1983, alleging that he was denied procedural due process and equal protection during state disbarment proceedings eleven years ago. The constitutional infirmities he alleges, however, were all raised in earlier proceedings and rejected in the state courts, and certiorari was denied. *Kaufman v. Association of the Bar of the City of New York*, 389 U.S. 1048 (1968) and 396 U.S. 905 (1969).

It has been held that a section 1983 action is not available under these circumstances to collaterally review the state disbarment proceedings. *Grossgold v. Supreme Court of Illinois*, 557 F.2d 122, 124 (7th Cir. 1977); *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976); *Ginger v. Circuit Court for the County of Wayne*, 372 F.2d 621 (6th Cir.), *cert. denied*, 387 U.S. 935 (1967). *See also Tang v. Appellate Division*, 487 F.2d 138 (2d Cir. (1973), *cert. denied*, 416 U.S. 906 (1974).

In view of our conclusion that the court lacks subject matter jurisdiction, we do not address the other grounds raised by defendant or plaintiff's motion for a preliminary injunction.

Accordingly, the complaint is dismissed.

So ordered.

Dated: New York, N.Y.
October 19, 1977

s/ Charles M. Metzger
U.S.D.J.

ORDER GRANTING MOTION DATED OCTOBER 19, 1977

October 19, 1977 Motion granted. See memorandum on plaintiff's motion for a preliminary injunction.

So ordered
Charles M. Metzger
U.S.D.J.

ORDER OF SPECIAL TERM, PART VII, SUPREME COURT OF THE STATE OF NEW YORK DATED MAY 1969

At a Special Term, Part VII of the Supreme Court of the State of New York, held in and for the County of New York, at 60 Centre Street in the Borough of Manhattan, City of New York on May 1969.

PRESENT: HON. FREDERICK BACKER, Justice.

In re Application of Leo Goldberg,
Assignee of part of the claim of Robert R. Kaufman, and Gas Check Corporation for payment of award for fixture damage, Parcel No. 28, on the damage map and in the final decree of the Supreme Court, in Proceeding to acquire title to real property required for Manhattan Civic Center Area, etc., in the Borough of Manhattan, City of New York.

A motion having been made for an order directing the Comptroller of the City of New York to pay to Leo Goldberg the sum of $1,150.00 principal with interest from July 9th, 1965, the award made herein to Gas Check Corporation for fixture damages by reason of the acquisition of title by The City of New York in the above-mentioned proceeding, to the lands and premises known therein as Damage Parcel No. 28 and said motion having duly come on to be heard on May 6, 1969.

NOW, on reading and filing the petition of Leo Goldberg, verified the 3rd day of March, 1969, and the notice of motion, with proof of due service thereof, and on all the papers and proceedings heretofore had herein; and, after hearing Philip Zichello, Esq., attorney for the

petitioner, in support of said motion, J. Lee Rankin, Esq., Corporation Counsel of The City of New York, appearing by Harold J. Lynch, Esq., Assistant Corporation Counsel, in opposition thereto, Bernard W. Coblentz, Esq., attorney for the Gas Check Corporation, in opposition thereto, and Robert R. Kaufman, the President of Gas Check Corporation appearing for himself, also in opposition to said motion, and the facts in the matter having been submitted to the Court, and the parties having stipulated in open Court, and due deliberation having been had thereon and upon filing the opinion of the Court, now

On motion of Philip Zichello, Attorney for the petitioner, it is

ORDERED, that the motion be and the same hereby is in all respects granted, and it is further

ORDERED, that the Comptroller of the City of New York withdraw and cancel the warrants totalling $4,969.24 payable to the Gas Check Corporation, now extant and it is further

ORDERED, that the Comptroller of the City of New York on behalf of The City of New York, pay the aforesaid award as follows: first

(a) To the City of New York for payment to date of its prior rent lien of $1,395.00, and second

(b) To Bernard W. Coblentz, Esq., in full payment of his lien of $544.00 for attorney's fees, and

(c) To Leo Goldberg as assignee of Gas Check Corporation the sum of $1,150.00, and lawful interest, and

(d) The balance, if any, to the Gas Check Corporation.

ENTER,

s/ Frederick Backer
J.S.C.
(FREDERICK BACKER)